

Rules for Conducting Grievance Hearings

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I. Overview of the Grievance Procedure

As provided by statute (Va. Code §§ 2.2-1202.1; 3000-3008), the Commonwealth's policy, as an employer, is to encourage the resolution of employee problems and complaints through training, consultation, mediation, and the grievance procedure. The Office of Employment Dispute Resolution (EDR) is the state office responsible for administering these programs.

The grievance procedure is a formal process through which most employees may seek resolution of a workplace dispute or concern.¹ An employee initiates a grievance by completing the Grievance Form A ("Form A") and submitting it to his or her immediate supervisor. The grievance can be initiated with a higher level supervisor if, for example, (i) the grievance alleges retaliation or discrimination by the immediate supervisor, (ii) the employee elects the expedited process, or (iii) the grievance challenges a disciplinary action initiated by someone other than the employee's immediate supervisor. The grievance then advances through the management resolution steps of the process. Grievances involving dismissals due to formal discipline or unsatisfactory job performance shall proceed directly to a formal hearing, omitting the management resolutions steps and the agency head's qualification determination. See *Grievance Procedure Manual* § 2.5.

The *Grievance Procedure Manual* lists the types of grievances that qualify for hearing. Any challenged management action or omission not qualified cannot be remedied through a hearing. Qualification determinations identify the issues to be resolved but do not determine the ultimate merits of the grievance. A hearing officer is not bound by factual determinations or findings in EDR qualification rulings. A hearing officer may not qualify an issue for hearing.

These *Rules* are considered part of the grievance procedure. To the extent there is any conflict between these *Rules* and the *Grievance Procedure Manual*, the provisions of the *Grievance Procedure Manual* control.

II. Summary of the Hearing Officer's Duties and Powers

In addition to the actions listed in § 5.7 of the *Grievance Procedure Manual*, the hearing officer is responsible for the following:

- Conducting the hearing in an equitable and orderly fashion.
- Complying with these *Rules*, the *Grievance Procedure Manual*, and other general administrative and/or technical instructions from EDR.
- Recording the hearing verbatim, marking the exhibits received into evidence and proffers not admitted, and making them a part of the grievance record.
- Writing a decision that contains a statement of the issues qualified, findings of fact on material issues and the grounds in the record for those findings, conclusions of policy and law, any aggravating or mitigating factors that were pertinent to the decision, and clearly defined order(s).
- Responding to requests for reopening the hearing or reconsideration of the decision.

¹ Va. Code § 2.2-3001.

- Revising the decision to conform to written policy if directed to do so by the Department of Human Resource Management.
- Correcting procedural errors regarding the conduct of the hearing, or revising the hearing decision to conform to the requirements of the grievance procedure, if directed to do so by EDR.
- In grievances challenging discharge, where the hearing officer orders reinstatement, awarding reasonable attorneys' fees, unless special circumstances would make an award unjust.
- For part-time hearing officers, sending the hearing record, including the hearing recording, to EDR once the decision is final or otherwise at the request of the EDR Hearings Program Director.
- Avoiding the appearance of bias.
- Avoiding *ex parte* communications with parties, unless such a communication is (i) for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits, (ii) the hearing officer reasonably believes that no party will gain a procedural or tactical advantage as a result, and (iii) the hearing officer promptly notifies the other party or parties of the substance of the communication and allows an opportunity to respond.
- Voluntarily recusing himself or herself and withdrawing from any appointed case (i) as required in "Recusal," § III(G), below, (ii) when required by the applicable rules governing the practice of law in Virginia, or (iii) when required by EDR Policy No. 2.01, Hearing Officer Program Administration.

III. Planning for the Hearing

A. Scheduling

The hearing officer's appointment letter from EDR encloses an Appointment of Hearing Officer Form B ("Form B") listing the name and contact information of each party to the grievance. Following appointment, a hearing officer should promptly contact the parties to schedule the hearing and pre-hearing conference.

B. Time

Generally, the hearing should occur within 35 calendar days after the hearing officer is appointed. However, the hearing officer in his or her discretion, may grant reasonable requests for extensions or other scheduling or deadline changes if no party objects to the request. If a party objects to the request, the hearing officer may only grant extensions of time or just cause – generally circumstances beyond a party's control. If any extensions are granted, the reasons for each extension should be stated in the written decision.

For circumstances within a party's control, the hearing officer should accommodate the party's scheduling wishes as flexibly as possible, but preferably within the 35-calendar day period. For example, because mediation and/or settlement are generally within the control of the parties, failure to resolve the dispute through either of those processes may not constitute just cause for an extension of the hearing date depending on the facts of the case. Thus, for instance, if settlement is being considered, the hearing date should be docketed as late within the 35-day period as possible to allow time for settlement negotiations. However, the hearing officer should advise the parties that absent an intervening event over which the parties have no control (e.g.,

the agency and the employee have reached a proposed settlement, but are awaiting any necessary Cabinet approval; accident; illness; death in family), the hearing *will* be conducted on the docketed date and that the parties should decide whether to settle before that date.

If one or more of the parties do not respond in a timely manner to the hearing officer's requests to schedule a pre-hearing conference and/or the hearing, the hearing officer has the authority to set a reasonable hearing date. The parties must be notified of the scheduled date and any other associated deadlines provided in a scheduling order, if applicable.

Most hearings can be completed within a day. However, hearings may continue beyond one day if necessary for a full and fair presentation of the evidence by both sides.

The hearing officer shall issue a written decision as promptly as possible after the conclusion of the hearing or the expiration of any period allowed for the receipt of additional evidence or briefing (i.e., the closing of the evidence).

C. Consolidation

At times, two or more pending grievances between the same employee and agency are qualified for hearing. At other times, two or more employees each file a grievance with the same agency challenging substantially similar management actions involving a single incident or set of circumstances. At the request of either party, or upon EDR's own motion, EDR may order that grievances involving the same (1) factual background and (2) issues or policies be consolidated and heard before the same hearing officer at a single hearing, to be followed with decision(s) addressing each of the qualified issues raised in the consolidated grievances. Where the grievances of two or more employees have been consolidated, the hearing officer will provide each employee with a separate opinion unless otherwise ordered by EDR.

Only EDR may order the consolidation of grievances for hearing. After a hearing officer has been appointed, EDR will accept requests for consolidation for hearing only in limited circumstances.

D. Pre-hearing Conference

The hearing officer shall schedule a pre-hearing conference, to be conducted by telephone or other equivalent means. A pre-hearing conference presents an opportunity to improve the management of the hearing through prior discussion and the resolution of procedural and evidentiary issues. During the pre-hearing conference, the hearing officer may assist the parties by:

- Explaining procedures that will be followed at the hearing; establishing the date, time, and location of the hearing; and confirming the roles of the parties, their advocates, and the hearing officer.
- Clarifying the issue(s) qualified for the hearing.
- Preparing the parties for the presentation of evidence at the hearing, particularly in light of the inapplicability of the technical rules of evidence.
- Ruling on preliminary procedural and evidentiary requests.
- Encouraging the parties to stipulate to facts or exhibits not in dispute and the applicable policies or laws.
- Issuing, upon request of the parties, orders for the appearance of witnesses at hearing and the production of documents.
- Establishing the date for the exchange of witness lists and documents, and ruling on any objections to these.

- Explaining the standard of proof to be applied and the order of presentation for each party.
- Affording the parties the opportunity, upon request, to review the grievance record for completeness and accuracy.

Importantly, too, a pre-hearing conference allows the hearing officer to instill confidence in the parties that their hearing officer is an independent and neutral decision-maker. In this regard, it is essential that the hearing officer establish and maintain a tone of impartiality. Hearing officers should bear in mind, during the pre-hearing conference and throughout the hearing process, that an idle gesture or remark, or an *ex parte* conversation (meaning that one party is absent from the discussion), can be perceived as partiality, no matter how necessary and proper such communication may have been.

E. Orders

The hearing officer's authority to order discovery (procedures used by either party to prepare for the hearing by obtaining information about the case from the other party) is more limited than that of a court. For example, the grievance procedure does not require, and hearing officers may not order (without both parties' agreement) discovery by (i) witness deposition (testimony recorded and provided under oath prior to the hearing); (ii) interrogatories (written questions about the case submitted by either party to the other party or witness); or (iii) requests for admissions (written statements concerning the case submitted by one party to the other, who then admits or denies each statement).

The hearing officer may, however, issue an order for witnesses, the production of documents, protective orders, or sanctions. Examples of the recommended format and content of orders are included in Appendix A. If a party believes that a hearing officer's order is out of compliance with the grievance procedure, the party may request a compliance ruling from EDR in accordance with the *Grievance Procedure Manual*.

Witness Orders: Orders should be issued in the name of the hearing officer and sent by the hearing officer to the appropriate individual(s), with a copy to each party. The agency shall make available for hearing any employee ordered by the hearing officer to appear as a witness. An order for an agency employee to testify as a witness should be sent to the agency's advocate, not the individual employee. The agency shall then provide a copy of the order to the employee and require his/her attendance at hearing. The hearing officer can ask the agency to schedule requested employee witnesses to a shift compatible with the date, time, and location of the hearing. If this unduly burdens the business of the agency, the hearing can be continued to another day, witnesses can testify by phone, or the hearing may be moved to a location at the work site.

Production of Documents: In considering a party's request for an order for the production of documents, hearing officers should bear in mind that under the grievance statutes, absent just cause, all documents, as defined in the Rules of the Supreme Court of Virginia,² relating to actions grieved "shall be made available" upon request from a party to the grievance, by the opposing party. EDR's interpretation of the mandatory language "shall be made available" is that absent just cause (e.g., legal privilege, undue burden, compelling security reasons), all relevant grievance-related information *must* be produced under the grievance statutes. Accordingly, an agency's discretion under the Freedom of Information Act or other statute to withhold certain documents from an employee does not necessarily extend to the grievance process. Documents

² Writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form. Supreme Court of Virginia Rule 4:9(a).

pertaining to non-parties that are relevant to the grievance must be produced in such a manner as to preserve the privacy of the individuals not personally involved in the grievance.³ Also, a party is not required to create and produce a document if the document does not exist. A hearing officer may order a party to produce previously undisclosed relevant evidence (documents or witnesses) at the hearing.

Protective Orders: For cases involving particularly sensitive relevant documents (for instance, documents addressing security issues or protected health information), the hearing officer has the authority to issue protective orders to limit the use and presentation of relevant documents for the hearing. The hearing officer also has the discretion to review documents in camera (privately) before requiring full, partial, or no disclosure.

Sanctions: The hearing officer has the authority to take necessary and appropriate action, including the authority to order sanctions against a party for the misconduct of the party or the party's advocate (for example, failure to comply with an order, discussing testimony with witnesses during the hearing, undue disruption of the hearing) during the hearing process to the extent such misconduct materially prejudices the opposing party's case at hearing or otherwise undermines or disrupts the integrity of the pre-hearing or hearing process.⁴ Permissible sanctions might include, for example,

- 1) Ordering the exclusion of related evidence or arguments;
- 2) Drawing an adverse inference (see § V(B));
- 3) Disqualifying an advocate from continued representation of a party;
- 4) Ejection from the hearing.

The hearing officer does not have the authority to order monetary penalties as sanctions. In considering any order of sanctions, the hearing officer should take into account, as appropriate, 1) whether a party is pro se or represented by an attorney or other experienced representative, and 2) the seriousness of the conduct, such as, for instance, whether the conduct was in bad faith rather than a simple mistake. The severity of any order of sanctions must be commensurate with the conduct necessitating the sanction. The ordered sanction and supporting reasons must be included in the hearing decision.

F. Distribution by Hearing Officer

A hearing officer need only send notifications, orders, or other communications to the advocates for the parties, or, if a party does not have an advocate, to the party or party's contact identified on the Form B. It is then the responsibility of these recipients to transmit the communications as needed to any others (e.g., other agency employees) involved in the grievance process. Copies of the final hearing decision, however, will be provided by the hearing officer only to the parties identified on the Form B and their advocates. See also § V(C).

G. Recusal

A hearing officer shall recuse himself or herself in any hearing "in which the [hearing officer's] impartiality might reasonably be questioned,"⁵ unless the basis for the potential recusal are disclosed and the parties consent to the hearing officer's continued service as described below. Grounds for recusal could include, but are not limited to:

³ However, the hearing officer must also ensure that relevant and material personal information is not withheld so as to unduly limit a party's due process interests. See *infra* § IV(F).

⁴ See Va. Code § 2.2-3005(C).

⁵ See, e.g., EDR Ruling No. 2004-934 (including additional discussion of EDR's application of the recusal standard).

- The hearing officer has a personal bias or prejudice concerning a party or a party's advocate;
- The hearing officer has personal knowledge of disputed evidentiary facts concerning the grievance;
- The hearing officer or a family member of the hearing officer:
 - Is a party or advocate in the grievance;
 - Is employed by a party to the grievance;
 - Has a financial interest that could be substantially affected by the grievance; or
 - Is likely to be a material witness in the grievance.

A hearing officer should disclose information that he or she believes the parties or their advocates might consider relevant to the question of recusal, even if the hearing officer believes there is no real basis for recusal. If following disclosure of any basis for recusal other than personal bias or prejudice concerning a party, the parties and advocates agree that the hearing officer should not be disqualified, and the hearing officer is then willing to participate, the hearing officer may participate in the proceeding. Disclosures of potential issues regarding recusal should be made as early in the hearing process as possible.

The hearing officer also “has a concomitant obligation not to recuse himself or herself absent a valid reason for recusal.” See, e.g., EDR Ruling No. 2004-934.

IV. The Hearing

Grievances focus on personnel matters impacting the privacy of the individuals involved, as well as the agency's personnel practices. To protect the privacy of all concerned, grievance hearings are not public hearings.

A. Persons Present

At the hearing officer's discretion, a hearing may proceed in the absence of one of the parties; a hearing so conducted will be decided on the grievance record and the evidence presented at the hearing. The hearing officer shall maintain order, decorum and civility during the hearing and shall have the authority to eject disruptive individuals from the hearing room. Disruptive conduct by a party or advocate during the hearings process may also result in the hearing officer ordering sanctions against that party or advocate (*see supra* § III(E)).

Parties: The parties to the grievance are the employee and the agency. The agency may select an individual to serve in its capacity as a party. The fact that the individual selected by the agency is directly involved in the grievance or may testify is of no import. Each party may be present during the entire hearing and may testify.

Advocates: Parties may be represented by legal counsel, another individual of choice, or themselves. The advocate, or the party without an advocate, may examine or cross-examine witnesses and present evidence. If a party is represented by more than one individual, however, only one advocate may examine an individual witness.

Witnesses: Each party may call witnesses to testify at the hearing. A non-party witness may be present in the hearing room only while testifying.

Aides/Interpreters: An impaired party, advocate, or witness may use an aide or an interpreter throughout the time that the individual is in the hearing room. Likewise, anyone not fluent in

English may use a language interpreter. It shall be the agency's responsibility to secure the services of any necessary aides/interpreters and to bear all associated costs.

Observers: The hearing officer has the authority to determine whether observers may be present during the hearing. Observers include anyone who is not a party, advocate, testifying witness, or aide/interpreter (e.g., friends, acquaintances, co-workers, or the agency's personnel officer). In deciding whether observers may attend the hearing, the hearing officer should recognize that non-parties might inhibit the full disclosure of information. The confidentiality of the parties and others not directly involved in the grievance must be preserved. Accordingly, at the request of one or both of the parties, the hearing should be closed to all persons who are not direct participants in the hearing. Because EDR is charged with oversight of the grievance process, any employee or designee of EDR may observe any hearing without first seeking or receiving permission to do so from the hearing officer.

B. Recording the Hearing

The hearing must be recorded verbatim to create a record should there be an administrative or judicial review of the hearing decision. It is the hearing officer's responsibility to record the hearing.⁶

Prior to commencing the hearing, the hearing officer must test the recording equipment to ensure that a clearly audible recording is produced. Parties may have a transcript produced at their own expense by ordering a duplicate copy of the hearing recording from the Hearing and engaging the services of a court reporter. If a transcript is produced, the opposing party must be permitted to purchase a copy at his/her expense.

C. Conducting the Hearing

The hearing must be conducted in an orderly, fair, and equitable fashion, pursuant to the provisions of the *Grievance Procedure Manual*. Because the grievance process permits use by unrepresented parties and lay advocates, the hearing officer must establish an informal, non-judicial hearing environment that is conducive to a free exchange of information and the development of the facts. The hearing officer is responsible for marking the exhibits received into evidence and making them a part of the grievance record. In addition, during the course of the hearing, the hearing officer may question the witnesses and, if essential to the resolution of a material issue in the case, request a party to provide further documentation. Hearing officers should exercise this discretion sparingly, however. The tone of the inquiry, the construct of the question, or the frequency of questioning one party's witnesses can create an impression of bias, so care should be taken to avoid appearing as an advocate for either side.

Each party may make opening and closing statements. In disciplinary actions and dismissals for unsatisfactory performance, the agency must present its evidence first and must show by a preponderance of the evidence (in other words, that it is more likely than not) that the action was warranted and appropriate under the circumstances. In all other actions, the employee must present evidence first and must prove his or her claim by a preponderance of the evidence. (See also below § VI(B)(1) regarding burdens of proof regarding mitigating circumstances in disciplinary actions.)

If procedural or compliance issues arise, the hearing officer may contact the Hearings Program Director for general guidance.

⁶ If cassette tapes are used to record the hearing, the write protection tabs must be removed as each tape is completed. The removal of the tabs should be recorded on the record (except with regard to the final tape, which can be announced at the conclusion of the hearing).

D. Admitting Evidence

The grievance hearing is not intended to be a court proceeding. Therefore, the technical rules of evidence do not apply and most probative evidence (any evidence that tends to prove that a material fact is true or not true) is admitted. However, the liberal admission of evidence should not be construed as a retreat from the underlying principles and reasoning behind rules of evidence. The purpose of liberal admission is to allow the introduction of evidence that might not be admissible under evidentiary rules, not to encourage the substitution of less reliable evidence for more reliable evidence. For example, because documents are typically the best evidence of their contents, when a party seeks to establish the contents of an available document, the party should introduce the document as evidence rather than relying solely upon an inherently less reliable form of evidence such as recollected testimony as to the document's contents. Because of the liberal admission policy, the hearing officer must exercise great care when considering and weighing the reliability of the evidence received.

The hearing officer may exclude evidence that is irrelevant, immaterial, insubstantial, privileged, repetitive, not timely exchanged consistent with the hearing officer's orders, or otherwise for just cause. The hearing officer may exclude evidence regarding any theory (for example, retaliation, discrimination, or inconsistent management actions) not raised by the time of the last pre-hearing conference. However, due consideration should be given as to whether there has been sufficient time to develop and/or raise such theories, as, for example, in a dismissal grievance proceeding immediately to hearing without benefit of the management resolution steps of the grievance process. If excluded, evidence about such theories should not be addressed at hearing or in the hearing officer's decision. However, testimony about previously unknown or undisclosed facts may still be admissible if relevant to matters properly at issue. Evidence that is newly discovered since the exchange of exhibits may be presented if the evidence could not have been discovered until that time through the due diligence of the party. Before excluding evidence as a means of sanctioning a party, the hearing officer must take into account the factors identified in § III(E) for considering an order for sanctions.

Unfounded objections to the admission of evidence by either party must be discouraged, however. An unrepresented party can become flustered when this occurs and may not know how to respond after such objections. If an advocate or a party disrupts the hearing with repeated objections or is argumentative, the hearing officer may declare a recess to talk about the standard of professional conduct expected of parties and advocates in the hearing.⁷

Pursuant to §§ 8.01-418.2 and 40.1-51.4:4 of the Code of Virginia, the results of polygraph tests of a party or a witness are not admissible as evidence in a grievance hearing except as to disciplinary or other actions taken against a polygrapher. Evidence related to such inadmissible polygraph tests shall not be submitted, referenced, referred to, offered or presented in any manner at hearing.

Pursuant to § 60.2-623.B of the Code of Virginia, determinations or decisions of the Virginia Employment Commission (VEC) are not admissible in grievance hearings. Information provided to the VEC is likewise not admissible at a grievance hearing unless the information was otherwise discoverable and could have been obtained through other means.

E. Witness Issues

All parties to the grievance, including the employee who initiates the grievance, may testify at hearing. The hearing officer is responsible for limiting the number of witnesses called by either party whenever the testimony would be merely cumulative. The purpose of this power is to

⁷ See EDR Ruling No. 2009-2091; see also *Grievance Procedure Manual* § 1.9.

ensure the speedy and efficient conduct of the hearing. However, when limiting the number of witnesses, the hearing officer should be careful not to exclude testimony that may be of greater weight or probative value than that already presented.

Sometimes a party may wish to present the testimony of an individual who is in the physical custody of the state. There is no law or policy that requires the agency to produce that individual to testify as a witness. Nevertheless, testimony from such a person may be important. If that is the case, the hearing officer should weigh the costs associated with transporting the witness to the hearing location, as well as any security or health risks that could arise as a result of such an order. If transporting the witness to the hearing is not feasible, testimony can be received via conference call or by conducting all or part of the hearing at the institution or building where the witness is housed. Another alternative is to admit a recorded statement from the witness.

There are several concerns regarding the testimony of those who are mentally incapacitated. Because there is a strong interest in protecting such a witness from aggressive direct or cross-examination, the hearing officer may choose to personally examine such a witness, as is done by the courts in competency proceedings, instead of allowing the parties to do so. Although the competency of a witness may be called into question, mental incapacity does not automatically disqualify a witness.⁸ A witness need only have personal knowledge of the event, and be able to perceive, remember, recognize the duty to tell the truth, and comprehend and respond to questions in an understandable manner.

The matter before the hearing officer may involve an individual who is not under the control of either party, such as a discharged patient or a customer of the agency. If the party has made a good faith effort to produce the witness, or if there are sound reasons for not requesting the presence of the witness, the hearing officer may admit any recorded statement or official report previously made by the unavailable witness.

F. Documents

The *Grievance Procedure Manual* does not require the use of affidavits or sworn statements at hearing. However, the formality of a recorded statement may affect the evidentiary weight that the hearing officer accords to the statement. If the hearing officer prefers a certain formality to recorded statements used in lieu of testimony, he or she should so inform the parties during the pre-hearing conference, and should explain to the parties how formality could affect the weight that will be given to such statements.

When a recorded statement is offered into evidence, the burden is on the party introducing the document to establish the truth of the facts contained in that statement. The truth of the facts can be established by direct or circumstantial evidence.

Personally identifiable information regarding individuals not party to the proceeding is often deleted from investigative notes or agency records. If a party objects to such deletions, or if the hearing officer deems that the deleted information is essential for a fair process to determine the merits of the grievance, the hearing officer should work with the parties to obtain the information in a format that does not violate the privacy rights of non-parties. If this is not feasible or fair, the hearing officer should seek to preserve confidentiality when non-party records, especially medical records, are exchanged or admitted into evidence, for example, by issuing a protective order.

A party's failure to comply with the grievance procedure or an order of EDR or the hearing officer regarding documents may result in the hearing officer ordering sanctions against that party. See *supra* § III(E); *infra* § V(B).

⁸ See U.S. v. Lightly, 677 F.2d 1027 (4th Cir. 1982).

G. Closing of the Evidentiary Record

The evidentiary record is generally closed at the conclusion of the hearing, unless the hearing officer has allowed for a period after the hearing for the receipt of additional evidence. The hearing officer may also allow a similar period after the hearing for the parties to submit additional briefing, which is not evidence. After the hearing officer closes the evidentiary record, additional evidence generally may not be admitted.

A narrow exception to prohibiting the admission of evidence after the close of the evidentiary record is the case of newly discovered evidence, an issue that can be raised through a Request for Administrative Review (see *Grievance Procedure Manual* § 7.2). Newly discovered evidence is evidence that was in existence at the time of the hearing, but was not known (or discovered) by the party until after the hearing officer closed the evidentiary record.⁹ In addition, to be “newly discovered,” the party must also show that (1) due diligence on the part of the party to discover the new evidence prior to the closure of the evidentiary record was exercised; (2) the evidence is not merely cumulative or impeaching; (3) the evidence is material; and (4) the evidence is such that is likely to produce a new outcome if the case were reheard, or is such that would require the judgment to be amended.¹⁰

V. The Decision

A. Deliberations

After the hearing, the hearing officer should deliberate on the evidence admitted at the hearing and arrive at a decision in an expeditious fashion. The hearing officer must not issue a bench decision immediately following the hearing. If additional information or clarification is required after the hearing, both parties must have the opportunity to respond to the hearing officer's request.

B. Use of Adverse Inferences

Although a hearing officer does not have subpoena power, he or she has the authority to and may draw adverse factual inferences against a party, if that party, without just cause, has failed to produce relevant documents, has failed to make available relevant witnesses as the hearing officer or EDR had ordered, or against an agency that has failed to instruct material agency employee witnesses to participate in the hearing process.¹¹ Under such circumstances, an adverse inference could be drawn with respect to any factual conflicts resolvable by the ordered documents or witnesses. For example, if the agency withholds documents without just cause, and those documents could resolve a disputed material fact pertaining to the grievance, the hearing officer could resolve that factual dispute in the grievant's favor. See also above § III(E) regarding sanctions.

C. Written Decision

A written decision shall be issued as promptly as reasonably possible after the close of the evidentiary record. The decision must resolve the grievance on the merits of the substantive issue(s) qualified and not on procedural issues. Challenges to management actions or omissions

⁹ See *Boryan v. United States*, 884 F.2d 767, 771 (4th Cir. 1989).

¹⁰ See *id.*

¹¹ Nothing in the *Rules* is intended to require any witness to provide information otherwise protected by law (e.g., attorney-client privilege; Fifth Amendment to the United State Constitution).

that have not been qualified in the grievance assigned to the hearing officer are not before that hearing officer, and may not be resolved or remedied. In reaching a decision, the hearing officer must consider de novo all evidence admitted into the hearing record. If a case is decided on issues of disputed facts, the hearing officer must identify and explain his/her reasoning in resolving the dispute(s).

The decision must contain a statement of the issues qualified; findings of fact on material issues and the grounds in the record for those findings; any related conclusions of law or policy; any aggravating or mitigating circumstances that are pertinent to the decision; and clearly identified order(s) specifying whether the agency's action has been upheld, reversed, or modified, and clearly listing all required actions. Finally, the decision must include, within its text, information regarding a party's right to appeal the decision.

EDR publishes all hearing decisions on its web site in a searchable format. In an effort to protect personal privacy, the decision itself must not reference any individual or entity (other than the party agency) by name.

The hearing officer must send his or her decision with a cover letter preferably by e-mail or fax, if accessible by the parties and advocates, so long as proof of receipt is established. If a party or advocate does not have access to e-mail or fax, the hearing decision must be sent by certified mail, return receipt requested, and regular mail. A copy of the decision must be provided to the grievant, the parties' advocates, and any other individuals identified on the Form B.

The decision must also be provided to EDR in an electronic format, either "text only" or Microsoft® Word. The electronic version may be sent as an e-mail attachment to EDR and/or the Hearings Program Director. See Appendix B for further information regarding policy on drafting and publishing hearing decisions.

VI. Scope of Relief

A. General

Under the grievance statutes, management is reserved the exclusive right to manage the affairs and operations of state government. In addition, challenges to the content of state or agency human resource policies and procedures are not permitted to advance to a hearing. Thus, in fashioning relief, the reasonableness of an established policy or procedure itself is presumed, and the hearing officer has no authority to change the policy, no matter how unclear, imprudent or ineffective he believes it may be.¹² However, the hearing officer may order relief to remedy the application of a policy when policy was misapplied, unfairly applied, or when that application is inconsistent with law or with another controlling policy.

Further, a hearing officer is not a "super-personnel officer."¹³ Therefore, in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy.

In general, the hearing officer is not limited to the specific relief requested by the employee on the Form A, as long as the relief granted is consistent with law, policy, and the grievance procedure.

¹² Cf. Pulliam v. Coastal Emergency Services, 257 Va. 1, 9, 509 S.E.2d 307, 311 (1999)(citing to the "well-established principle" that all statutes are presumed to be constitutional, and that unless "plainly repugnant" to the state or federal constitution, the wisdom or propriety of a statute is for the legislature, not the courts, to decide).

¹³ Cf. DeJarnette v. Corning, 133 F.3d 293, 299 (4th Cir. 1998)("Title VII is not a vehicle for substituting the judgment of a court for that of the employer").

When the grievance involves a disciplinary matter, the hearing officer may uphold or reverse the disciplinary action challenged by the grievance, or, in appropriate circumstances, modify the action; the hearing officer may also order the reinstatement of a grievant with backpay for the appropriate period. The awardable period may not extend back beyond the 30 calendar day statutory period preceding the initiation of the grievance.¹⁴

All remedies provided by a hearing officer in his/her decision must conform to law, policy, and the grievance procedure.

B. Disciplinary Actions

The *Standards of Conduct* is a statewide policy promulgated by the Department of Human Resource Management, and is applicable to most executive branch agencies and institutes (those with employees subject to the Virginia Personnel Act). Under the *Standards of Conduct*, offenses are grouped into three levels according to the severity of the behavior.¹⁵

Group I offenses include acts of minor misconduct that require formal disciplinary action. Group II offenses include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action and may result in up to 10 days of suspension without pay. Group III offenses include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination. As the *Standards of Conduct* states, the listed offenses are not "all inclusive, but are intended as examples of conduct for which specific disciplinary actions may be warranted." Accordingly, agencies may issue a Written Notice for an offense not specifically listed in the *Standards of Conduct*. In all circumstances, however, the employee must receive notice of the charges in sufficient detail to allow the employee to provide an informed response to the charge.¹⁶ The hearing officer should ensure that an employee receives adequate post-disciplinary due process. Thus, a hearing officer's review is limited to the conduct charged in the Written Notice and attachments.

1. Framework for Determining Whether Discipline was Warranted and Appropriate

The responsibility of the hearing officer is to determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances.¹⁷ To do this, the hearing officer reviews the evidence *de novo* (afresh and independently, as if no determinations had yet been made) to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct; and (iii) whether the disciplinary action taken by the agency was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense).

¹⁴ Compare *Brinkley-Obu v. Hughes Training, Inc.*, 36 F.3d 336 (4th Cir. 1994) (in context of a Title VII or Equal Pay Act violation, relief is available only for the designated statutory time) with Va. Code §2.2-3003(C) (in context of an employee grievance, designated time to file is 30 calendar days).

¹⁵ It should be noted that employees at a number of institutions of higher education are not subject to the Virginia Personnel Act. These institutions may have adopted their own disciplinary policies. Further, certain state agencies whose employees are subject to the Virginia Personnel Act may adopt their own conduct policies. Such policies must be consistent with the provisions of the DHRM *Standards of Conduct*. See DHRM Policy 1.60. Grievance hearings and hearing decisions must be based on the operative disciplinary policy.

¹⁶ See, e.g., *O'Keefe v. U.S.P.S.*, 318 F.3d 1310, 1315 (Fed. Cir. 2002).

¹⁷ *Grievance Procedure Manual*, § 5.8.

When a disciplined employee asserts that the discipline was issued for an improper reason,¹⁸ the employee is deemed to be raising an affirmative defense and it is the employee's burden to prove the affirmative defense.¹⁹ The agency has no burden to disprove the affirmative defense.²⁰

If the agency does not prevail as to any of the elements (i) through (iii) above, the disciplinary action should not be upheld. If the agency prevails on all three elements, the hearing officer must then consider whether the grievant has shown, by a preponderance of the evidence, that there were nevertheless mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether any aggravating circumstances exist that would overcome the mitigating circumstances. See Mitigating and Aggravating Circumstances below.

In reviewing agency-imposed discipline, the hearing officer must give due consideration to management's right to exercise its good faith business judgment in employee matters, and the agency's right to manage its operations.²¹ Therefore, if the hearing officer finds that (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.²² (See Mitigating and Aggravating Circumstances below.)

When the hearing officer sustains fewer than all of the agency's charges, the hearing officer may reduce the penalty to the maximum reasonable level sustainable under law and policy so long as the agency head or designee has not indicated at any time during the grievance process or proceedings before the hearing officer that it desires that a lesser penalty be imposed on fewer charges.²³

Sometimes an employee may experience an "adverse employment action" (e.g., discharge, transfer, demotion, etc.)²⁴ that is not accompanied by a formal Written Notice as contemplated by

¹⁸ For example, an employee might argue that the disciplinary action violates law or was otherwise discriminatory or retaliatory.

¹⁹ See *Edwards v. Dep't of Veterans Affairs*, 100 M.S.P.R. 437, 2005 MSPB LEXIS 6557 (2005).

²⁰ See *id.*

²¹ In *LaChance v. M.S.P.B.*, 178 F.3d 1246 (Fed. Cir. 1999), the court noted that "it is a well-established rule of civil service law that the penalty for employee misconduct is left to the sound discretion of the agency." *Id.* at 1251 (citing *Miguel v. Department of the Army*, 727 F.2d 1081, 1083 (Fed. Cir. 1984)); see also *Beard v. General Serv. Admin.*, 801 F.2d 1318, 1321 (Fed. Cir. 1986) ("[T]he employing (and not the reviewing) agency is in the best position to judge the impact of employee misconduct upon the operations of the agency . . ."); *Hunt v. Department of Health and Human Servs.*, 758 F.2d 608, 611 (Fed. Cir. 1985) ("Determination of an appropriate penalty is a matter committed primarily to the sound discretion of the employing agency.").

²² Cf. *Davis v. Department of Treasury*, 8 M.S.P.R. 317 (1981)(the Merit Systems Protection Board (MSPB) "will not freely substitute its judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"). See also *Mings v. Department of Justice*, 813 F.2d 384, 390 (Fed. Cir. 1987)(The MSPB "will not disturb a choice of penalty within the agency's discretion unless the severity of the agency's action appears totally unwarranted in light of all factors.").

²³ Cf. *Lachance*, 178 F.3d at 1260.

²⁴ See *Boone v. Goldin*, 178 F.3d 253 (4th Cir. 1999) (under Title VII, an "adverse employment action" typically requires discharge, demotion, or reduction in grade, salary, benefits, level of responsibility, title, or opportunities for future reassignments or promotions). See also *Von Gunten v. Maryland Department of the Environment*, 243 F.3d 858, 866 (4th Cir. 2001)(citing *Munday v. Waste Mgmt. of North America, Inc.*, 126 F.3d 239, 243 (4th Cir. 1997)).

the *Standards of Conduct*, but which may have been taken for essentially disciplinary reasons -- in other words, to correct or penalize behavior by enforcing applicable standards of conduct or performance. If the grievance is qualified, the grievant will have the burden of proving at hearing that the contested adverse employment action, though unaccompanied by a formal Written Notice, was nevertheless taken for disciplinary reasons. If the hearing officer finds that the contested action was disciplinary, the agency will have the burden of proving that the action, though disciplinary, was warranted. As with formal disciplinary actions, the hearing officer shall consider mitigating and aggravating circumstances, giving appropriate deference to the agency's right to manage its affairs.

2. Mitigating and Aggravating Circumstances: DHRM's *Standards of Conduct* allows agencies to reduce the disciplinary action if there are "mitigating circumstances," such as "conditions that would compel a reduction in the disciplinary action to promote the interests of fairness and objectivity; or . . . an employee's long service, or otherwise satisfactory work performance." By law, the hearing officer must "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency."²⁵ Examples of "mitigating circumstances" to be considered by the hearing officer include, but are not limited to:

- whether an employee had notice of the rule, how the agency interprets the rule, and/or the possible consequences of not complying with the rule;²⁶
- whether the discipline is consistent with the agency's treatment of other similarly situated employees; or
- whether the penalty otherwise exceeds the limits of reasonableness under all the relevant circumstances.

In making such a determination the hearing officer must give due weight to the agency's discretion in managing and maintaining employee discipline and efficiency, recognizing that the hearing officer's function is not to displace management's responsibility but to assure that managerial judgment has been properly exercised within the tolerable limits of reasonableness.²⁷ A hearing officer must give deference to the agency's consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency's discipline only if, under the record evidence, the agency's discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency's discipline, the hearing officer shall state in the hearing decision the basis for mitigation.

The grievant has the burden to raise and establish mitigating circumstances that justify altering the disciplinary action consistent with the "exceeds the limits of reasonableness" standard. The agency has the burden to demonstrate any aggravating circumstances that might negate any mitigating circumstances.

3. Accumulated Discipline: Under DHRM's *Standards of Conduct*, Written Notices remain "active" for a specified period of time and may be used, while "active," in conjunction with other disciplinary actions by the agency as the basis for suspending, transferring, demoting, or terminating an employee. Because the active life of a Written Notice is prescribed by policy, the hearing officer cannot change the length of the active life as a means of reducing the discipline.

²⁵ Va. Code § 2.2-3005(C)(6).

²⁶ However, an employee may be presumed to have notice of written rules if those rules had been distributed or made available to the employee. Proper notice of the rule and/or its interpretation by the agency may also be found when the rule and/or interpretation have been communicated by word of mouth or by past practice. Notice may not be required when the misconduct is so severe, or is contrary to applicable professional standards, such that a reasonable employee should know that such behavior would not be acceptable.

²⁷ Cf. *Douglas v. Veterans Admin.*, 5 M.S.P.R. 280, 302 (1981).

If the grievance involves an agency action based on accumulated active Written Notices, the hearing officer must ascertain from the agency whether any of the other Written Notices supporting the action are being grieved. If so, final disposition of the grievance before the hearing officer must wait until the grievances on the other Written Notices have been decided. The hearing officer should determine immediately the appropriate level of discipline (Group I, II, or III) for the grievance before him or her, but must await the outcome of the other grievance(s) to determine whether there are sufficient cumulative active Written Notices to support the agency's disciplinary action.

4. Suspension and Termination: DHRM's *Standards of Conduct* governs the number of days of suspension associated with a disciplinary action. The hearing officer has authority to order a lesser, but not greater, number of days of suspension than the agency issued to the employee. The hearing officer's order must be consistent with the *Standards of Conduct*.

An employee may be terminated for misconduct based on the receipt of a single Group III Written Notice or for the accumulation of active Group I, II, or III Written Notices as provided in the *Standards of Conduct*. A hearing officer may order that the employee be reinstated while upholding the level of the Written Notice. The hearing officer must give deference, however, to the agency's decision to discharge as opposed to suspend an employee, and thus, may mitigate discharge to a suspension only if the discharge exceeds the limits of reasonableness. If the hearing officer rescinds or reduces a Written Notice and the employee's total accumulated active Written Notices are insufficient to sustain a termination, the employee must be reinstated.

C. Non-disciplinary Actions

As with disciplinary actions, the hearing officer must review the evidence *de novo* and all remedies for non-disciplinary actions must conform to law, policy, and the grievance procedure. The grievant bears the burden of proof for grievances regarding non-disciplinary actions.

1. Misapplication or Unfair Application of Policy: If the issue of policy misapplication is qualified for hearing, and the hearing officer determines that a policy mandate has been misapplied or applied unfairly, the hearing officer may order the agency to reapply the policy from the point at which it became tainted. However, in cases where the hearing officer concludes that written policy requires a particular result without the exercise of agency discretion (i.e., no other outcome under policy), the hearing officer may order the agency to implement those particular policy mandates.

Remedies that conform to law and policy for misapplications or unfair applications of policy may include:

- When written policy mandates a certain level or type of compensation, making the mandatory upward pay adjustment commencing at the beginning of the 30 calendar day statutory period preceding the initiation of the grievance.
- A classification review of a position by the agency in accordance with policy (not the award of any particular classification, unless it is the only possible result under a written policy mandate).
- A repeat of the selection process by the agency in accordance with policy (not the selection of any particular employee for the job, unless such a selection is the only possible result under a written policy mandate).
- Compensation by the agency of a nonexempt employee for past unpaid overtime work (either at time-and-one-half if the employee has actually worked over 40 hours, or straight time if the hours actually worked do not exceed 40 hours because the employee was on scheduled leave) where required by written policy

commencing at the beginning of the 30 calendar day statutory period preceding the initiation of the grievance.

- Compensation by the agency of a promoted employee as required by written policy commencing at the beginning of the 30 calendar day statutory period preceding the initiation of the grievance.
- Compensation by the agency of an employee whose position changed to a different role in a higher pay band, if mandated by written policy (e.g. bringing salary up to the minimum of the new pay band) commencing at the beginning of the 30 calendar day statutory period preceding the initiation of the grievance.
- Having the agency advise the employee of the potential for further training and/or counseling services (not requiring the agency to provide a service or requiring the employee to participate).
- Reinstatement of the grievant in an appropriate case (for example, where the layoff policy was materially violated).

2. Arbitrary or Capricious Performance Evaluation: The *Grievance Procedure Manual* defines "arbitrary or capricious" as "in disregard of the facts or without a reasoned basis."²⁸ If a contested performance evaluation is qualified for hearing, and a hearing officer finds that it is arbitrary or capricious, the only remedy is for the agency to repeat the evaluation process and provide a rating with a reasoned basis related to established expectations. The remedy cannot include an award of any particular rating, unless it is the only possible result under a written policy mandate.

3. Retaliation/Discrimination: If the issue of retaliation or discrimination is qualified for hearing and the hearing officer finds that it occurred, the hearing officer may order the agency to create an environment free from discrimination and/or retaliation, and to take appropriate corrective actions necessary to cure the violation and/or minimize its reoccurrence. The hearing officer should avoid providing specific remedies that would unduly interfere with management's prerogatives to manage the agency (e.g., ordering the discipline of the manager for discriminatory supervisory practices).

D. Other Remedies

1. Reinstatement: Reinstatement means an order returning the employee to the position he or she formerly held prior to a separation, demotion, or transfer. In some circumstances, reinstatement to the exact same position may not occur. Where the position has been filled or no longer exists, reinstatement means returning the employee to an equivalent position.²⁹

2. Back Pay: Back pay may be awarded, and must be considered, as required by the circumstances of the individual case. The hearing officer has no authority to award front pay or damages. An order for back pay generally includes an award of back benefits, including seniority.

²⁸ See *also* Norman v. Dept. of Game and Inland Fisheries (Fifth Judicial Circuit of Virginia, July 28, 1999)(Delk, J.). The court's opinion in *Norman* indicates that an arbitrary or capricious performance evaluation is one that no reasonable person could make after considering all available evidence, and that if an evaluation is fairly debatable (meaning that reasonable persons could draw different conclusions), it is not arbitrary or capricious. Thus, mere disagreement with the evaluation or with the reasons assigned for the ratings is insufficient to sustain an arbitrary or capricious performance evaluation claim as long as there is adequate documentation in the record to support the conclusion that the evaluation had a reasoned basis related to established expectations.

²⁹ See Va. Code § 2.2-3005.1(A).

If back pay is awarded, it must be offset by interim earnings. Interim earnings include unemployment compensation and other income earned or received to replace the loss of state employment. Thus, if an employee had previously engaged in gainful employment in addition to his or her state employment, the earnings from this ancillary employment would generally not count as interim earnings.

The authority of the hearing officer in determining the amount of back pay in a disciplinary matter is limited by the accumulated amount of discipline. For example:

- If a Written Notice is rescinded or reduced, and the total accumulated discipline is insufficient to support a suspension of any length, back pay must be awarded.
- If there are insufficient active Written Notices remaining to support a termination, back pay must be ordered. The amount of back pay that may be withheld is limited to the period of suspension allowed by the accumulated Written Notices, as delineated in DHRM's *Standards of Conduct*.
- No back pay can be ordered if the termination or suspension without pay resulted from a Written Notice that is not before the hearing officer.

3. Transfer or Assignment of Employees: A hearing officer may order the transfer or assignment of an employee as a form of relief only i) to return the employee to the status quo in correcting improper or unsupported disciplinary action, retaliation, discrimination, or misapplication or unfair application of policy, OR ii) if it is determined that the employee is entitled to the relief based on the effect of law or, in the absence of agency discretion, policy, procedure, or agency practice. Due consideration should be given to whether there is an available position to which a transfer can be ordered.

E. Attorneys' Fees

An employee who is represented by an attorney and substantially prevails on the merits of a grievance challenging his or her **discharge**³⁰ is entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust. For such an employee to "substantially prevail" in a discharge grievance, the hearing officer's decision must contain an order that the agency reinstate the employee to his or her former (or an equivalent) position. Attorneys' fees are not otherwise available for employees who prevail at grievance hearings.

When the hearing officer issues the initial decision ordering reinstatement, the decision is considered an "original" decision as described in §7.2(a) of the *Grievance Procedure Manual* and §VII(A) of these *Rules for Conducting the Grievance Hearings (Rules)*. Thus, within 15 calendar days of the issuance of the original decision, either party may seek administrative review in accordance with §7.2(a) and §VII(A). In addition, counsel for the grievant shall ensure that the hearing officer *receives*, within 15 calendar days of the issuance of the original decision, counsel's petition for reasonable attorneys' fees. The hearing decision shall inform grievant's counsel of the obligation to timely submit the fees petition.

The fees petition shall include an affidavit itemizing services rendered, the time billed for each service, and the attorney's customary hourly rate not to exceed the amounts provided on EDR's website.³¹ A separate maximum amount will be established for attorneys located in Northern Virginia.³¹ A copy of the fees petition must be provided to the opposing party at the time it is

³⁰ For purposes of an award of attorneys' fees, "discharge" shall mean any involuntary separation from employment with the Commonwealth. Therefore, attorneys' fees could be available in grievances challenging an involuntary layoff or involuntary resignation.

³¹ Northern Virginia includes the counties of Fairfax, Arlington, Prince William, and Loudon, and the cities of Alexandria, Fairfax, Falls Church, Manassas, and Manassas Park.

submitted to the hearing officer. The opposing party may contest the fees petition by providing a written rebuttal to the hearing officer.

If neither party requests an administrative review, the hearing officer must issue an addendum to the decision denying or awarding, in part or in full, the fees requested in the petition and should do so no later than 30 calendar days from the date of the initial decision.

If either party has timely requested one or more administrative reviews as described in § VII(A) of the *Rules*, all administrative reviews must be issued (as well as any reconsidered decision by the hearing officer) before the hearing officer issues the fees addendum. The hearing officer should issue the addendum within 15 calendar days of the issuance of the last of the administrative review decisions.

Within 10 calendar days of the issuance of the fees addendum, either party may petition EDR for a decision solely addressing whether the fees addendum complies with the *Grievance Procedure Manual* and these *Rules*. Once EDR issues a ruling on the propriety of the fees addendum, and if ordered by EDR, the hearing officer has issued a revised fees addendum, the original decision becomes “final” as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

VII. Challenges to the Hearing Officer’s Decision

A hearing decision must be consistent with law, policy, and the grievance procedure (including the *Grievance Procedure Manual* and these *Rules for Conducting Grievance Hearings*). A hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review. For more detailed discussion of these appeal rights, see *Grievance Procedure Manual* §§ 7.1 – 7.3.

A. Administrative Review of Hearing Decisions

A hearing officer’s decision is subject to administrative review by both EDR and Director of DHRM based on the request of a party. Requests for review may be initiated by electronic means such as facsimile or e-mail. See *Grievance Procedure Manual* § 8.10. However, as with all aspects of the grievance procedure, a party may be required to show proof of timeliness. Therefore, parties are strongly encouraged to retain evidence of timeliness. A copy of all requests for administrative review must be provided to the other party, EDR, and the Hearing Officer.

Important Note: Requests for administrative review must be in writing and **received by** the reviewer within 15 calendar days of the date of the original hearing decision. **Received by** means delivered to, not merely postmarked or placed in the hands of a delivery service.

A challenge that the hearing decision is inconsistent with state or agency policy is made to the Director of DHRM. This request must refer to a particular mandate in state or agency policy. The Director’s authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests must be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401 or e-mailed.

Challenges to the hearing decision for noncompliance with the grievance procedure and/or the *Rules for Conducting Grievance Hearings*, as well as any request to present newly discovered evidence, are made to EDR. Requests must be sent to the Office of Employment Dispute Resolution, 101 N. 14th Street, 12th Floor, Richmond, VA 23219, faxed or e-mailed to EDR. This request must state the specific requirement of the grievance procedure with which the hearing

decision is not in compliance. EDR's authority is limited to ordering the hearing officer to revise the decision so that it complies with the grievance procedure. (See also *Grievance Procedure Manual*, "Hearing Officer Noncompliance" § 6.4).

The opposing party may submit a written challenge (rebuttal) to any request for review to the appropriate administrative reviewer. If the opposing party chooses to submit a rebuttal, it must be **received by** the reviewer within 10 calendar days of the date the opposing party received the request for administrative review. A copy of any such rebuttal must also be provided to the appealing party, EDR, and the hearing officer.

If requests for administrative review have been made to both the DHRM Director and EDR, the hearing officer need not reconsider his/her decision, if ordered to do so on remand, until both administrative reviews are issued or otherwise concluded unless otherwise directed by EDR in the interests of procedural efficiency. If requests for administrative review have been made to both the Director of DHRM and EDR, EDR shall generally respond first. Administrative reviews by the Director of DHRM should be issued within 30 calendar days of the conclusion of any other administrative reviews.

B. Final Hearing Decisions³²

A hearing officer's decision becomes a final hearing decision, with no further possibility of administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; **or**
2. All timely requests for administrative review have been decided and, if ordered by EDR or the Department of Human Resources Management, the hearing officer has issued a revised decision.

Once the hearing decision becomes final, the Division of Hearings will forward the hearing record to the agency. The record consists of:

- The original Form A.
- Attachments to the Form A.
- Qualification determinations.
- Recording of the hearing (verbatim).
- Exhibits both proffered and received in evidence.
- Hearing officer orders.
- Other correspondence or documentation submitted and/or communicated by the parties or hearing officer during the hearing phase deemed material to the appellate proceedings.

³² See exception for discharge hearings where grievant is reinstated and awarded attorneys' fees at §VI(E) of these *Rules* and §7.2(e) of the *Grievance Procedure Manual*.

- Hearing officer's decision(s), including any original, revised, or reconsidered decision and the attorneys' fees addendum, if applicable.
- Administrative challenges to the decision and fees addendum, and decisions on those challenges by the hearing officer, Director of the Department of Human Resource Management, or EDR.

C. Judicial Review of Final Hearing Decisions

Once a hearing decision becomes final (see above Section VII.B), either party may seek review by the circuit court having jurisdiction in the locality in which the grievance arose on the ground that the final hearing decision is contradictory to law. The court shall award reasonable attorneys' fees and costs to the employee if the employee substantially prevails on the merits of the appeal. For additional information about judicial reviews of hearing decisions, see *Grievance Procedure Manual* § 7.3, including the requirement that an agency must request within 10 calendar days of the final hearing decision and receive approval from EDR before filing a notice of appeal.

Either party may appeal the final decision of the circuit court to the Court of Appeals pursuant to Virginia Code § 17.1-405.

D. Implementation of Final Hearing Decisions

Once a hearing decision becomes final (see above Section VII.B), either party may petition the circuit court having jurisdiction in the locality in which the grievance arose for an order requiring implementation of that decision. The court shall award reasonable attorneys' fees and costs to the employee if the employee substantially prevails on the merits of the implementation petition.

VIII. Billing for Hearing Officers

All part-time, private sector hearing officers must send their bills for hearing services directly to the agency, with a copy to EDR. The bills are to adhere to the flat rate fee schedule established for full-time and part-time hearing officers. The fee amount covers all services and disbursements incurred in conducting an employee grievance hearing, including travel, trip, and office expenses. Grievances that are settled or concluded prior to the hearing are billed on a prorated basis-

- 10% after the appointment and opening of a file.
- 25% after the prehearing conference is scheduled.
- 50% after the prehearing conference is conducted.
- 100% after the hearing officer travels to the hearing site.

Appendix A

State Employee Witnesses

TO: WITNESS (C/O Agency)

Order

Pursuant to the Commonwealth of Virginia's *Grievance Procedure*, § 2.2-3000 et seq. of the Code of Virginia, your presence is hereby ordered as a witness in the above-referenced grievance. Your testimony has been deemed necessary to determine the merits of the grievance. You should understand that you either must appear on [date, time and location] or must notify me by [date/time] at [telephone and address] that you will not be appearing and provide a reason. If your attendance is not possible on the date requested, alternative arrangements can be made.

Pursuant to the *Grievance Procedure Manual* § 5.3, the agency shall make available for hearing any employee ordered by the hearing officer to appear as a witness. As a state employee, the time spent at the grievance hearing will be considered work time and you will be on administrative leave and entitled to travel expenses.

Your participation in this hearing is an activity protected from retaliation by law.

(Hearing Officer Name)

cc: Agency Advocate/Contact
Employee

Witnesses

TO: WITNESS

Order

Pursuant to the Commonwealth of Virginia's *Grievance Procedure*, § 2.2-3000 et seq. of the Code of Virginia, your presence is hereby ordered as a witness in the above-referenced grievance. Your testimony has been deemed necessary to determine the merits of the grievance. You should understand that you either must appear on [date, time and location] or must notify me by [date/time] at [telephone and address] that you will not be appearing and provide a reason. If your attendance is not possible on the date requested, alternative arrangements can be made.

(Hearing Officer Name)

cc: Agency Advocate/Contact
Employee

Appendix B

EDR Publication Policy

Policy Statement:

To promote a better understanding of the grievance procedure and a consistent application of its rules, as well as state and agency policy, the General Assembly has mandated that the Department of Employment Dispute Resolution (“EDR”) publish its rulings and hearing officer decisions. To achieve an appropriate balance between a citizen’s right to access records of governmental activities and the privacy concerns of individuals, EDR will publish all rulings and hearing officer decisions in a manner that seeks to preserve personal privacy. To accomplish this end, EDR will require hearing officers to draft their opinions in accordance with the guidelines set forth below. EDR rulings will also conform to the guidelines below.

Guidelines:

1. Individuals will not be referenced by name in the body of the ruling or decision. Instead, the person who initiated the grievance shall be referred to as the “grievant.” Likewise, witnesses and agency representatives shall be referred to by job title (e.g., the first lieutenant or accountant senior) or simply by their relationship to the grievant or the agency (e.g, inmate, patient, immediate supervisor, grievant’s spouse). The agency should be named but identification of particular facilities should be avoided. Similarly, names of particular localities and other specifically identified places should be avoided.
2. When EDR rulings and hearing decisions are mailed to the parties, they will be accompanied with cover pages that identify, by name, the parties to the grievance. The cover page shall be the only portion of the decisions or ruling that contains individuals’ names. To preserve privacy, ruling and decision cover pages will not be published.
3. EDR rulings and hearing decisions should be written in “plain English.” The use of legal terminology should be avoided to the extent possible. (Example: the phrase “among other things” should be used instead of “inter alia”).
4. Final drafts of hearing decisions must be provided to EDR in an electronic format.